Zamrud Properties Sdn Bhd v Pang Mooi Gaid & Anor

HIGH COURT (SHAH ALAM) — NOTICE OF MOTION NO MT1-21-116 OF 1998
FAIZA TAMBY CHIK J
6 OCTOBER 1998

Civil Procedure *— Irregularity — Wrong mode of commencing action — Applicant filed notice of motion — Notice of motion followed Form 10 — Failure to obtain signature of solicitor in conduct — Whether wrong mode of originating process filed — Whether wrong to follow Form 10 — Whether defect of not stating intitulement to action can be cured*

Civil Procedure *— Forum conveniens — Original suit in Kuala Lumpur Sessions Court — Applicant's place of business, first respondent's residence and land in dispute in Kuala Lumpur — Whether Shah Alam High Court right forum to hear matter*

Civil Procedure *— Government proceedings — Injunction — Application to compel government body to do an act — Absence of word 'injunction' — Barred by s 29(2) of Government Proceedings Act 1956 — Whether prayer should be dismissed*

Civil Procedure *— Affidavits — Application of Evidence Act 1950 to affidavits — Hearsay evidence allowed if affidavit used in interlocutory proceedings — Court had duty to make final order — Whether hearsay evidence allowed*

The applicant filed a notice of motion (encl 1) for an order of court to compel the second respondent (Jabatan Kimia Malaysia) to conduct a forensic test on a letter to ascertain whether the signature contained therein belongs to the first respondent. The first respondent raised the following preliminary objections: (i) the mode of application by way of notice of motion was bad in law; (ii) the application did not comply with Form 10 of the Rules of the High Court 1980 ('the RHC'); (iii) the application has not stated the statute or the rules of the court under which the court was being moved; (iv) the application should not have been made in the Shah Alam High Court; (v) the application amounts to a mandatory order against a government body; (vi) delay in making the application and no explanation for the delay; and (vii) the affidavit in support of encl 1 did not comply with O 41 r 1(4) of the RHC — the deponent had not stated his residential address — and O 41 r 5(1) — the deponent had no personal knowledge of the happenings of the course of the trial at the sessions court.

Held, dismissing the application and upholding the preliminary objections:

(1) Pursuant to O 5 r 1 of the RHC, there are only four modes of originating process, namely writ of summons, originating summons, originating motion or petition. By virtue of the applicant filing the originating process by way of a notice of motion, the application has clearly contravened O 5 r 1 of the RHC (see p 186C).

(2) Under O 8 r 3(1) of the RHC, a notice of an originating motion must be in Form 9 and the notice of any other motion in Form 10.

A The applicant had clearly not followed Form 9. The notice of motion filed followed Form 10 which is normally used as an interlocutory application and not as an originating process. This is clearly wrong as one does not use a summons in chambers to originate an action in court. In any event, the notice of motion had not complied with Form 10. Under Form 10, the signature of the B solicitor in conduct was required and not that of a senior assistant registrar. This was another irregularity contained in the enclosure (see pp 186C–187B), *Yap Hong Thin & Anor v Seenevasam* [1970] 1 MLJ 143 followed.

(3) It is clear under the RHC that an application by way of motion C should clearly particularize the intitulement. However, the applicant had not stated the statute or the rules of court under which the court is being moved. In short, the applicant had not stated the intitulement to this action. This defect could not be condoned or cured (see pp 187C and 188A).

D (4) Since the original suit was started in the Kuala Lumpur Sessions Court, the applicant had a place of business in Kuala Lumpur, the first respondent resided in Kuala Lumpur and the land upon which the dispute arose is also in Kuala Lumpur, there is no purpose in bringing this particular suit before the Shah Alam High Court which is not the right forum to hear the matter. It is not E convenient for all parties concerned and this application should have been filed in Kuala Lumpur (see p 188H–I).

(5) No injunction can directly or indirectly be issued against the government or its officers. Jabatan Kimia Malaysia (the second respondent) is a government body. Despite the absence of the word injunction, the essence of the prayer prayed for in encl 1 is F to compel the second respondent to do an act. This is barred by s 29(2) of the Government Proceedings Act 1956 and therefore, encl 1 should be dismissed in limine (see pp 189I and 190A–B); *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 followed.

G (6) It took the applicant nearly two months to file this application. There was no explanation whatsoever for the delay in the applicant's affidavit. The lax attitude of the applicant should not be condoned. A litigant who seeks the intervention of the court in a matter that affects his rights must do so timeously. The law only gives help to those who are vigilant and not to those who are H indolent (see p 190F–I).

(7) Order 41 r 1(4) of the RHC provides that every affidavit must be expressed in the first person and must state the place of residence of the deponent. This is mandatory requirement because of the word 'must' (see pp 190I and 191A–B); *Perbadanan Nasional* I *Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85 followed.

(8) Pursuant to O 41 r 5(2) of the RHC, hearsay evidence is allowed provided that the purpose of the affidavit sworn is used in interlocutory proceedings. In the instant application, the court is

imposed with the duty of making a final order with regard to the prayers in encl 1. In this context, hearsay evidence is not allowed and the affidavit sworn was a direct contravention of O 41 r 5(1) which states that an affidavit may contain only such facts as the deponent is able of his own knowledge to prove (see p 191E–F).

[**Bahasa Malaysia summary**

Pemohon memfailkan suatu notis usul (lampiran 1) untuk satu perintah mahkamah bagi mewajibkan penentang kedua (Jabatan Kimia Malaysia) untuk menjalankan ujian forensik ke atas sepucuk surat bagi menentukan sama ada tandatangan yang terkandung dalamnya dimiliki oleh penentang pertama. Penentang pertama telah membangkitkan bantahan permulaan berikut: (i) cara permohonan melalui notis usul adalah tidak sempurna di sisi undang-undang; (ii) permohonan tidak mematuhi Borang 10 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'); (iii) permohonan tidak menyatakan statut atau kaedah mahkamah di bawah mana permohonan dibuat kepada mahkamah; (iv) permohonan tidak seharusnya dibuat di Mahkamah Tinggi Shah Alam; (v) permohonan sama seperti perintah mandatori terhadap perbandanan kerajaan; (vi) kelewatan dalam membuat permohonan dan tiada penjelasan untuk kelewatan tersebut; dan (vii) afidavit menyokong lampiran 1 tidak mematuhi A 41 k 1(4) KMT — saksi sumpah tidak menyatakan alamat kediamannya — dan A 41 k 5(1) — saksi sumpah tidak mempunyai pengetahuan diri tentang kejadian semasa perbicaraan di mahkamah sesyen.

Diputuskan, menolak permohonan dan mengesahkan bantahan permulaan:

(1) Menurut A 5 k 1 KMT, hanya terdapat empat cara proses pemula, iaitu writ saman, saman pemula, usul pemula atau petisyen pemula. Memadangkan pemohon telah memfailkan proses pemula melalui notis usul, permohonan jelas telah melanggar A 5 k 1 KMT (lihat ms 186C).

(2) Di bawah A 8 k 3(1) KMT, suatu notis usul pemula mestilah berbentuk Borang 9 dan notis tentang mana-mana usul yang lain dalam bentuk Borang 10. Pemohon jelas tidak mematuhi Borang 9. Notis usul yang difailkan menyusul Borang 10 yang biasanya digunakan sebagai permohonan interlokutori dan bukan sebagai proses pemula. Ini adalah salah kerana seseorang tidak menggunakan saman dalam kamar bagi memulakan tindakan di mahkamah. Bagaimanapun, notis usul tidak mematuhi Borang 10. Di bawah Borang 10, tandatangan peguamcara yang mengendalikan kes dikehendaki dan bukannya tandatangan penolong kanan pendaftar. Ini merupakan satu lagi luar aturan yang terkandung dalam lampiran tersebut (lihat ms 186C–187B), *Yap Hong Thin & Anor v Seenevasam* [1970] 1 MLJ 143 diikut.

(3) Adalah nyata di bawah KMT bahawa permohonan melalui usul seharusnya memaparkan tajuk. Namun demikian, pemohon tidak menyatakan statut atau kaedah mahkamah di bawah mana permohonan dibuat kepada mahkamah. Secara ringkas, pemohon tidak menyatakan tajuk kepada tindakan ini. Kecacatan ini tidak boleh dibiarkan atau dipulihkan (lihat ms 187C dan 188A).

(4) Oleh kerana guaman asal dimulakan di Mahkamah Sesyen Kuala Lumpur, pemohon mempunyai tempat perniagaan di Kuala Lumpur, penentang pertama menetap di Kuala Lumpur dan tanah atas mana pertikaian timbul juga di Kuala Lumpur, tiada gunanya dalam menghadapkan guaman khusus ini ke Mahkamah Tinggi Shah Alam yang bukan merupakan forum yang betul untuk membicarakan perkara tersebut. Ianya tidak sesuai untuk semua pihak yang terlibat dan permohonan ini sepatutnya difailkan di Kuala Lumpur (lihat ms 188H–I).

(5) Tiada injunksi secara langsung atau tidak langsung boleh dikeluarkan terhadap kerajaan atau pegawai-pegawainya. Jabatan Kimia Malaysia (penentang kedua) adalah suatu perbadanan kerajaan. Meskipun perkataan 'injunksi' tidak disebut, intipati permohonan dalam lampiran 1 adalah untuk mewajibkan penentang melakukan sesuatu. Ini dilarang oleh s 29(2) Akta Prosiding Kerajaan 1956 dan maka, lampiran 1 patut ditolak in limine (lihat ms 189I dan 190A–B); *Government of Malaysia v Lim Kit Siang and another appeal* [1988] 2 MLJ 12 diikut.

(6) Pemohon mengambil masa hampir dua bulan untuk memfailkan permohonan ini. Tiada apa-apa penjelasan untuk kelewatan dalam afidavit pemohon. Sikap cuai menjaga pemohon tidak harus dibiarkan. Litigan yang meminta bantuan mahkamah dalam perkara yang menjejaskan haknya mestilah berbuat demikian secepat mungkin. Perundangan hanya menghulurkan bantuan kepada mereka yang sentiasa berjaga-jaga dan bukan yang berat tulang (lihat ms 190F–I).

(7) Aturan 41 k 1(4) KMT memperuntukkan bahawa setiap afidavit mestilah dinyatakan 'in the first person' dan mesti menyatakan tempat penetapan saksi sumpah. Ini adalah satu keperluan mandatori disebabkan perkataan 'must' (lihat ms 190I dan 191A–B); *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85 diikut.

(8) Menurut A 41 k 5(2) KMT, keterangan dengar cakap dibenarkan dengan syarat tujuan afidavit yang diikrarkan digunakan dalam prosiding interlokutori. Dalam permohonan ini, mahkamah wajib membuat perintah muktamad berhubung dengan permohonan dalam lampiran 1. Dalam konteks ini, keterangan dengar cakap tidak dibenarkan dan afidavit yang diikrarkan adalah pelanggaran terus A 41 k 5(1) yang menyatakan bahawa suatu afidavit hanya boleh mengandungi fakta-fakta yang saksi sumpah sendiri boleh buktikan berdasarkan pengetahuannya (lihat ms 191E–F).]

Notes

For a case on wrong mode of commencing action, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) para 2472.

For a case on forum conveniens, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) para 2909.

For cases on injunction in government proceedings, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1911–1912.

For a case on application of the Evidence Act 1950 to affidavits, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) para 229.

Cases referred to

Abdul Halim bin Abdul Hanan & Ors v Pengarah Penjara, Taiping & Ors [1996] 4 MLJ 54 (refd)

Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman [1995] 1 MLJ 457 (refd)

Chong Siew Choong v PP [1996] 5 MLJ 65 (refd)

Dayasar Corp Sdn Bhd v CP Ng & Co [1990] 1 MLJ 191 (refd)

Fung Beng Tiat v Marid Construction Co [1996] 2 MLJ 413 (refd)

Government of Malaysia v Lim Kit Siang and another appeal [1988] 2 MLJ 12 (folld)

Ho Kok Thin & Ors v The Sherrif/Registrar of the High Court Borneo & Anor [1989] 3 MLJ 181 (refd)

Khor Cheng Wah v Sungei Way Leasing Sdn Bhd [1996] 1 MLJ 223 (refd)

Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong [1996] 3 MLJ 85 (folld)

Public Bank Bhd v Berjaya Housing Development Sdn Bhd & Ors [1995] 1 CLJ 237 (refd)

Ratnam v Cumarasamy [1965] 1 MLJ 228 (refd)

Sova Sdn Bhd v Kasih Sayang Realty Sdn [1988] 2 MLJ 268 (refd)

Yap Hong Thin & Anor v Seenevasam [1970] 1 MLJ 143 (folld)

Legislation referred to

Courts of Judicature Act 1964 s 23(1)

Federal Constitution art 121, (1)

Government Proceedings Act 1956 s 29(2)

Rules of the High Court 1980 O 2 r 1, O 5 rr 1, 3, O 8 r 3(1), O 41 rr 1(4), 5(1), (2), Forms 9, 10

Mahadevi Nadchatiram and *Shanti Thiruchelvasegaram* (*Mahadevi Nadchatiram & Partners*) for the applicant.

Karen Kaur Bal (*Zairina Loh & Wong*) for the first respondent.

Nik Suhaimi bin Nik Sulaiman (Penasihat Undang-Undang Negeri Selangor) for the second respondent.

Faiza Tamby Chik J:

The applicant had filed a notice of motion dated 14 August 1998 (encl 1) and an affidavit-in-support affirmed by Tan Tiong on 12 August 1998 (encl 2).

The applicant is seeking an order of court to have a letter dated 1 November 1993 to be sent to the Jabatan Kimia in order to verify the signature contained therein and to further compel the first respondent to provide specimen signatures for that purpose. Further, the applicant is also seeking a stay of the Sessions Court Suit No 52–4885–95 pending the verification of the signature by the Jabatan Kimia.

The first respondent had raised preliminary objections to encls 1 and 2 vide letter dated 17 August 1998 to the applicant's solicitors.

The preliminary objections are as follows:

(1) that the mode of application by way of notice of motion is bad in law;

(2) that the application did not comply with Form 10 of the Rules of the High Court 1980 ('the RHC');

(3) that the application had not stated the statute or the rules of the court under which the court is being moved;

(4) that the application should not have been made in Shah Alam High Court;

(5) that this application is bad in law as it amounts to a mandatory injunction against a government body;

(6) that there is a delay in making the application;

(7) that there is no explanation or reasonable explanation for the delay in making the application;

(8) that the affidavit did not comply with O 41 r 1(4) of the RHC; and

(9) that the affidavit did not comply with O 41 r 5(1) of the RHC.

The preliminary objections are raised without prejudice to the first respondent's right to affirm an affidavit-in-reply to encl 2 in the event the preliminary objections are disallowed.

Preliminary objection

(1) That the mode of application by way of 'notis usul' is bad in law.

(2) That the application did not comply with Form 10 of the RHC.

(3) That the application had not stated the statute or the rules of court under which the court is being moved.

Enclosure 1 that is filed herein is an originating application. Order 5 r 1 of the RHC reads:

> Subject to the provisions of any written law and of these rules, civil proceedings in the High Court may be begun by writ, originating summons, originating motion or petition.

Order 5 r 3 reads:

> Proceedings by which an application is to be made to the High Court or a Judge thereof under any written law must be begun by originating summons except where by these rules or by or under any written law the application in question is expressly required or authorized to be made by some other means.

Pursuant to O 5 r 1 of the RHC, it is clear that there are only four modes of originating process. They are: writ of summons, originating summons, originating motion or petition. By virtue of the applicant filing the originating process by way of a 'notis usul' (notice of motion), the application has clearly contravened O 5 r 1 of the RHC.

What is a notice of motion? Pursuant to O 8 r 3(1) of the RHC, a notice of an originating motion must be in Form 9 and the notice of any other motion in Form 10 of the RHC. Under Form 9, the notice of originating motion has the following titles:

> In the High Court of Malaya at ...
>
> OM No ...
>
> (Seal)
>
> In the matter of ...
>
> and
>
> In the matter of ...

The applicant has clearly not followed Form 9 of the RHC in this case. The notice of motion filed in this case is following Form 10 of the RHC. This notice of motion (encl 1) is akin to a summons in chambers which is normally used as an interlocutory application and not as an originating process. This is clearly wrong as one does not use a summons in chambers to originate an action in court. The Federal Court in *Yap Hong Thin & Anor v Seenevasam* [1970] 1 MLJ 143 had the occasion to deal with a similar preliminary objection. The question posed to the Federal Court then was whether an application for recovery of possession under the Control of Rent Act can be made by way of originating motion. The Federal Court upheld the decision of the learned trial judge and held that where a person seeks an order of court for possession of premises in the High Court he has to do so by writ of summons in an action. Ali FJ in *Yap Hong Thin*'s case in the course of the judgment had this to say at pp 144–145:

> ... For myself I feel inclined to think that the learned trial judge was right in dismissing the application. The appellants have chosen a course of action which was wrong right from the very start. They have done so upon an erroneous view of the law. To order a stay is to speculate on the possibility that they may decide to proceed by way of action. There is no reason why we should so speculate. The respondent having successfully objected to the form of proceeding ought not to be further inconvenienced by having to ponder when litigation would come to an end .... If there is going to be any difficulty it is one for which the appellants are wholly to blame. I would dismiss this appeal.

A The applicant in the instant case had initiated an action not by an originating process but by way of an application which is commonly used for interlocutory application. Thus, on the authority of *Yap Hong Thin*, encl 1 should be dismissed with costs.

Be that as it may, even the 'notis usul' filed had not complied with B Form 10 of the RHC. Under Form 10 of the RHC, the signature of the solicitor in conduct is required and not that of the senior assistant registrar of the High Court. This is another of the irregularities contained in encl 1.

Pursuant to O 5 r 3 of the RHC, an application made to the High Court or a judge thereof under any written law must be begun by originating summons except where by these rules or by or under any written law the C application in question is expressly required or authorized to be made by some other means. This rule clearly states that an application to a judge pursuant to any written law must be begun by originating summons. However, the applicant in this action has not stated the statute or the rules of court under which the court is being moved. In short, the applicant has not stated the intitulement to this action. D

The importance of stating the particular rule of court or the written law in its intitulement has been authoritatively cited in the Court of Appeal decision of *Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457 where the court held at p 477:

> E ... The summons does not, as I observed very early in this judgement, state any particular rule of court in its intitulement. Now, I think that that is not only wrong but plainy embarassing. How, might one ask, is a defendant or the court to determine which rule of court the plaintiff is invoking unless he explicity specifies it? If a defendant and the court should have to conduct a close examination of the supporting affidavit in each case in order to determine the particular jurisdiction or power that is being invoked by an F originating summons or other originating process that requires an intitulement, then a plaintiff will be at liberty to shift from one rule to another or indeed from one statute to another as it pleases him without any warning whatsoever to his opponent or the court. It would make a mockery of the principle that there must be no surprise in civil litigation. If the submission of counsel be the law, then it is wrong. But I am firmly of the view that it is not.
>
> G In my judgment, this matter which is a point of practice and procedure, is to be resolved by reference to the fundamental principle that a party must not take his opponent or the court by surprise. It is my opinion that an originating process requiring an intitulement must state, with sufficient particularity, either in its heading or in its body, the statute or rule of court under which the court is being moved; otherwise it would be an embarrassing H pleading and may be liable to be struck out, unless sooner amended.

Similarly, in *Chong Siew Choong v PP* [1996] 5 MLJ 65, Abdul Malik Ishak J, dealing with similar objections raised, held that the failure to cite the intitulement in a miscellaneous criminal application is fatal and consequently refused to grant the prayers as sought for in the application. I Abdul Malik Ishak J said that the inherent powers of the High Court cannot be exercised to override or circumvent the express provisions of the law.

A perusal of encl 1 will show that no particular Act or rules of court was stated. In short, there was no intitulement stated in encl 1. It is clearly

expressed under the RHC that an application filed by way of motion should clearly particularize the intitulement. There are no particulars in the intitulement of encl 1. Applying the principle enunciated in *Cheow Chew Khoon*, this is one defect that cannot be condoned nor cured. Coupled with the fact that encl 1, being an originating application, filed under a wrong mode of application the defects are fatal and cannot be cured.

(4) That the application should not have been made in Shah Alam High Court

It is submitted that this application should not have been commenced in the Shah Alam High Court. It is admitted that the Shah Alam High Court does have jurisdiction to hear this application as provided by art 121 of the Federal Constitution, however, it is submitted that it is not the proper forum.

Article 121(1) of the Federal Constitution provides:

> There shall be two High Courts of co-ordinate jurisdiction and status, namely —
>
> (a) one in the States of Malaya which shall be known as the High Court of Malaya which shall have its principal registry in Kuala Lumpur; and
>
> (b) one in the States of Sabah and Sarawak which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;
>
> ...

By art 121, a litigant is entitled to file his action in any of the High Courts. However, this freedom is subject to s 23(1) of the Courts of Judicature Act 1964 which clearly provides:

> Subject to the limitations contained in Article 128 of the Federal Constitution the High Court shall have jurisdiction to try all civil proceedings where —
>
> (a) the cause of action arose;
>
> (b) the defendant or one of the defendants resides or has his place of business;
>
> (c) the facts on which the proceedings are based exist or are alleged to have occurred; or
>
> (d) any land the ownership of which is disputed is situated.

In the instant case, it is submitted that the original suit was started in the Kuala Lumpur Sessions Court, the applicant has a place of business in Kuala Lumpur, the first respondent resides in Kuala Lumpur and the land upon which the dispute arose is also in Kuala Lumpur. Therefore, it is further submitted that one does not see the connection or the purpose in bringing this particular suit before the Shah Alam High Court which is not the right forum to hear the matter. It is definitely not convenient for all parties concerned. It is submitted that this application should have been filed in Kuala Lumpur. There are only four High Courts sitting in Shah Alam whereas there are many civil courts in Kuala Lumpur as there are three different divisions of civil courts sitting in Kuala Lumpur, ie the

A Commercial Division, the Civil Division and the Appellate and Special Powers Division.

The purpose of having various branches of the High Court is to ensure that litigants can come to court without inconvenience and to ease the work loads and prevent backlog of cases in any one or more of the branches of the
B High Courts.

The principle of convenience had been considered in the case of *Sova Sdn Bhd v Kasih Sayang Realty Sdn* [1988] 2 MLJ 268, where the court stated at p 271 that:

> It is quite obvious that in creating a branch of the High Court in Malaya in each state, the legislature had two things in mind:
C
> (i) to enable parties of a civil suit to have easy access to a branch of the High Court in Malaya located in a state where either the plaintiff or the defendant resides. ...
>
> (ii) the obvious reason for the setting up of a branch of the High Court in Malaya in every one of the 11 states [in Malaya] is to facilitate the
D disposal of cases in Malaya and to cut down, even if it is not yet possible to obliterate, the backlog of cases pending in any one or more of the branches of such High Court.
>
> For the reasons as stated above, I do not think that the present proceedings should be dealt with by this court ... .

E The above principle has been followed by the court in *Dayasar Corp Sdn Bhd v CP Ng & Co* [1990] 1 MLJ 191, where the court struck out the petition which was wrongly commenced at an incovenient forum.

The Federal Court in *Fung Beng Tiat v Marid Construction Co* [1996] 2 MLJ 413 held that the court of first instance erred in failing to recognize the fact pattern before it as disclosing a point of territorial jurisdiction.
F

(5) That this application is bad in law as it amounts to a mandatory injunction against the government

In essence the applicant in the instant case is seeking an injunction to compel the second respondent ie Jabatan Kimia Malaysia to conduct a
G forensic test on the letter dated 1 November 1993 to ascertain whether the signature contained therein belongs to one Pang Mooi Gaid, the first respondent. Section 29(2) of the Government Proceedings Act 1956 ('the Act') provides:

> The court shall not in any civil proceedings grant any injunction or make any
H order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government.

In *Ho Kok Thin & Ors v The Sherrif/Registrar of the High Court Borneo & Anor* [1989] 3 MLJ 181, this point of law was considered. The court held
I that no injunction could be directly or indirectly issued against the government or its officers. It thus seemed clear that no injunction, permanent or interim, would be issued ...'. The court in coming to this conclusion applied the majority decision in *Government of Malaysia v Lim*

Kit Siang and another appeal [1988] 2 MLJ 12 where the Supreme Court has authoritatively stated that no injunction could be directly or indirectly issued against the government or its officers. Clearly, Jabatan Kimia Malaysia/second respondent is a government body. Despite the absence of the word 'injunction', the essence of the prayer prayed for in encl 1 is to compel the second respondent to do an act. This is barred by the said s 29(2) of the Act and the principles enunciated above and therefore encl 1 should be dismissed in limine.

(6) That there has been a delay

(7) That the applicant has not provided the court with a reasonable explanation for the delay

As submitted above this application arose from Kuala Lumpur Sessions Court Summons No 52–4885–95. As can be seen from the summons number the case has been initiated in 1995, about three years ago. The said matter was heard before the session court judge on 18 June 1998. In the course of the trial the said letter was referred to the first respondent and requested by counsel for the applicant to be marked as an 'exhibit'. The first respondent could not identify the said letter and therefore could not confirm whether she was the author of the said letter. For this reason, the application by learned counsel for the applicant to tender the said letter as an exhibit was objected to. The matter has since been adjourned to 1 September 1998 for continued hearing.

The importance of the said letter to the applicant is obvious by the filing of this very application before this court. Despite the importance, there was no urgency in the applicant to file this application earlier. It took the applicant nearly two months to file this application. There was also no explanation whatsoever for the delay in the applicant's affidavit. The lax attitude of the applicant should not be condoned. In this context the maxim *vigilantibus non dorminetibus jura subveniunt* is applicable. A litigant who seeks the intervention of the court in a matter that affects his rights must do so timeously. The law only gives help to those who are vigilant and not to those who are indolent (See *Khor Cheng Wah v Sungei Way Leasing Sdn Bhd* [1996] 1 MLJ 223 at p 229). In the instant case, there is no explanation for the delay. In point of fact, the applicant's counsel said in her submission that that there is no need to give any explanation for the delay as she is of the view that there was no delay.

(8) That the affidavit did not comply with O 41 r 1(4) of the RHC

The affidavit in support, ie encl 2 did not comply with O 41 r 1(4) of the RHC, as the deponent has not stated his residential address as required.

Order 41 r 1(4) of the RHC provides:

> Every affidavit must be expressed in the first person and must state the place of residence of the deponent ... .

This is a mandatory requirement because of the word 'must', as stated in the Court of Appeal case of *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85 at p 93:

A

> ... The word 'must' as opposed to 'may' is used in the rule, and we interpret that to mean as implying a peremptory mandate as opposed to a mere direction or discretion as the word 'may' implies. We equate the meaning of the word 'must' as that given to the word 'shall', and for that reason the choice of the word 'must' in the rule does not create the existence of any discretion or empowers the court to exercise such discretion.

B Further, in the case of *Public Bank Bhd v Berjaya Housing Development Sdn Bhd & Ors* [1995] 1 CLJ 237, the court at p 240, despite holding in the circumstances of the case that the defence by their conduct, had waived their right to object to the defects, notwithstanding stated that (the court) view with concern and do not condone any laxing as to compliance with the C rules of procedure regarding affidavits and do not wish to be complacent on such matters.

(9) That the affidavit did not comply with O 41 r 5(1) of the RHC

The deponent in encl 2 has clearly stated that he was informed by his D counsel of the happenings at the full trial in the sessions court. The deponent clearly has no personal knowledge of the happenings or the course of the trial at the sessions court and therefore is unable on his own to prove the facts as alleged in his affidavit. This is clearly hearsay evidence. Pursuant to O 41 r 5(2) of the RHC, hearsay evidence is allowed provided that the purpose of the affidavit sworn is used in interlocutory proceedings.

E In the instant application, the court is imposed with the duty of making a final order with regard to the prayers in encl 1. In this context hearsay evidence is not allowed and the affidavit sworn is a direct contravention of the rules of the court. Order 41 r 5(1) states, '... an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.'

F The case of *Abdul Halim bin Abdul Hanan & Ors v Pengarah Penjara, Taiping & Ors* [1996] 4 MLJ 54 held:

> (1) Under O 41 r 5(1) of the Rules of the High Court 1980 ('the RHC'), a deponent of an affidavit to be used in support therein may only swear an affidavit of facts that he is able of his own knowledge to prove. As plaintiff's counsel was not a prisoner of the Taiping Prison at the material G time, he would not be able to depose of facts alleged to have occurred at the said prison. The fact that all the plaintiffs subsequently swore affidavit saying they confirmed the facts deposed to by their counsel without averring to the facts themselves would not validate the plaintiffs' case. As the plaintiffs' case rested solely on the affidavit of counsel, the summons was irregular and must fail (see p 60D–I); ... .

H It is true that O 2 r 1 of the RHC gives the court a discretion to rectify the irregularities. However, it must be noted here that there are a long train of errors committed by the applicant as highlighted above. Further, the defects raised in preliminary objections (1), (2), (3), (5), (8), and (9) are fundamental defects which cannot be cured. The Privy Council in the I celebrated case of *Ratnam v Cumarasamy* [1965] 1 MLJ 228 had stated that rules of the court must prima facie be obeyed. The lax and cavalier attitude that has been adopted by the applicant in this matter if condone will make a mockery out of the rules of the court.

For all these reasons the applicant's application in encl 1 is dismissed with costs. And the preliminary objections by the respondents are upheld.

Application dismissed. Respondents' preliminary objections upheld.

Reported by Jafisah Jaafar